IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STONE & WEBSTER ENGINEERING CORPORATION, a corporation, *Plaintiff in Error,* vs. ELI MELOVICH, *Defendent in Error.*	No.

Brief of Plaintiff in Error

KERR & McCORD,
Attorneys for Plaintiff in Error.

Hoge Building
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Press of Pliny L. Allen

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STATEMENT

We think it will be more convenient and less confusing to refer in this brief to the plaintiff in error as the "defendant" and to the defendant in error as the "plaintiff."

The plaintiff was injured on the 12th day of July, 1910, at Snoqualmie Falls, King County, Washington, by having his arm caught within re-

volving cog wheels used in operating an elevator for carrying gravel from a pit to a gravel washing machine, situated about twenty-five feet above the ground. At the time of the injury plaintiff was engaged in oiling the bearings of the shafts operating the cog wheels in said gravel washing machine or structure. The gravel carrying elevator was furnished power by an electric motor situated on the ground about twenty-five feet below the revolving cog wheels, upon which the injury occurred. Plaintiff had been employed by the defendant for some weeks prior to the injury and his duties consisted in operating a similar electric motor located a short distance from the gravel washing machine, and he had also been employed as a brakesman in the operation of electric cars upon a railroad. The revolving cog wheels, where the injury occurred, as before stated, were located about twenty-five feet above the ground upon which the washing machine stood. Immediately beneath the cog wheels was a platform about four feet wide and about six feet in length. On either side of this platform were timbers and supports about four feet above the platform or staging. Across the platform two shafts extended, resting upon said timbers or sup-

ports. The bearings of the two shaftings rested upon said timbers or supports about four feet above the platform. Upon each shaft were two cog wheels, one a small and the other a large wheel. The smaller cog wheel was about five inches in diameter and the larger cog wheel about twenty-four inches in diameter, and the cogs interlaced. The cog wheels and bearings were located at one end of the platform. The larger cog wheel was on the outer shafting and the smaller cog wheel on the inner shafting. In oiling the bearings of the shaftings, the oiler stood upon the platform facing the cog wheels, which revolved toward the oiler, and the cog wheels were about four feet upon the platform, upon which the oiler stood. The space between the timbers above the platform and on a level with the cog wheels was about three feet. The oiler used a can with a hooked stem from twelve to eighteen inches in length. The accident occurred in the afternoon of the aforementioned date, and it was perfectly light at the place where the injury occurred, and all of the machinery, including the shaftings and the cog wheels, were visible to any one in the possession of ordinary vision and eyesight. The plaintiff oiled the bearings on his right

hand, facing the revolving cog wheels, without injury, and after the right bearings had been oiled, he undertook to oil the bearings on the left side of the revolving cog wheels, and in doing so his clothing was caught in the revolving cog wheels and his arm drawn therein and injured to such an extent that it required amputation. The plaintiff had oiled the bearings of the shaftings supporting the cog wheels on several occasions prior to the date of the injury and on several days prior to that time.

Two grounds for negligence were charged in the complaint. The first, that there was a failure on the part of the defendant to furnish the plaintiff a safe place in which to work; second, the failure on the part of the defendant to provide and maintain reasonable safeguards for the cogs, shafts and gearings.

Through some inadvertence or for some reason all of the papers filed in the action below had been incorporated in the printed transcript, but all that portion of the printed transcript between pages 37 and 142, inclusive, is wholly immaterial to any of the issues involved upon this appeal, and should

never have been incorporated in the transcript, as all of such proceedings related to the first trial of this cause in the Court below. After the first trial of the case, a new trial was granted, and the second trial occurred on the 20th day of December, 1911, and a verdict on December 22nd, 1911, for $4,262.00, was returned in favor of the plaintiff and against the defendant, and judgment entered thereon.

The cause went to trial the second time upon the issues made up by the second amended complaint (Transcript, page 144), the answer (Trascript, page 32) and the reply (Transcript, page 38). The material allegations of the second amended complaint are as follows:

I.

"That the defendant, on the 12th day of July, 1910, and prior thereto, operated at Snoqualmie Falls, King County, Washington, a mill or factory wherein machinery was used, to-wit: A concrete mixing and manufacturing establishment consisting of two power houses, constructed of brick and concrete and approximately one hundred and fifty (150) feet square and two stories high, and three motor houses and many small buildings, and a large building or structure some sixty (60) feet in height, wherein was operated by electric power a large amount of concrete mixing machinery, elevators, chains, cogs, gearing, belting and other machinery,

which said establishment was used by the defendant in the production and manufacture of a mercantile substance or commodity known as concrete.

II.

That the buildings were all of a permanent nature and a part of the concrete manufacturing plant maintained by defendant company in manufacturing concrete for the Snoqualmie Dam, at which establishment there were two hundred to three hundred men employed at the time and prior to the time of this accident.

III.

That at the top of said structure or concrete lift, defendant operated certain bull cogs, pinion wheels, driving wheels and gears to run the elevator, and with which cogs and gears the employes of the defendant were liable to come in contact, while in the performance of their duty as such employes, and which it was practicable to guard, and which could be effectually guarded with due regard to the ordinary use of said cogs and gears and the dangers to employes therefrom, and without interfering with the efficiency of said machinery by so guarding.

IV.

That the defendant, on or about the said date and prior thereto, failed and neglected to provide a safe place in which for plaintiff to work and reasonable guards for the said cogs and gears were wholly unprotected.

V.

That on and prior to said date, the plaintiff was employed by the defendant as a laborer in and about said factory or mill, and that on said date plaintiff was ordered by the foreman or superintendent acting for the defendant corporation to oil the said cogs and gears while the same were in motion, and the plaintiff while exercising due care and without fault or negligence on his part, attempted to oil the said cogs and gears while the same were in motion, in obedience to the defendant's direction as aforesaid; he came in contact with the said cogs and gears, and had his right arm caught therein, and the same was crushed, broken and mangled, and that plaintiff was thereby so forcibly and violently thrown on and against the said cogs and gears, and the machinery connected therewith, that plaintiff's face was severely torn open and bruised so as to necessitate the sewing up thereof, and that by reason thereof plaintiff was compelled to have and did have his said right arm amputated, and a severe surgical operation performed upon his injured face and breast as aforesaid, and that by reason of the said injuries plaintiff has suffered great mental and physical pain, and was rendered incapable of following his usual avocation in life; that by reason of his said injuries plaintiff was confined in the hospital for a period of twenty-eight days. Ever since said accident and especially since the amputation of his right arm, he has suffered great pain in the three-inch stump thereof, and apparent pains in the arm which was torn off in the machine as aforementioned. Plaintiff has suffered with great pain in his left breast and chest ever since said accident to the present time, and even now he has pains in his said left side, which plaintiff and his physicians believe to be the result of internal in-

juries which he received by his said contact with the cogs aforementioned; that plaintiff had been running a motor and cars and it had not been part of his duty to oil the machinery aforementioned; that this work had been done by the engineer who was in charge of plaintiff and directed his work. About six or seven days before this accident happened, namely, on or about July 6th, 1910, plaintiff's former boss or head, the engineer aforementioned, was changed, and plaintiff was placed under a new engineer whose name is not known to the plaintiff, but who is known as Slim Dickey, and plaintiff was instructed by this engineer or boss to oil said machine, which work had formerly been done by the engineer aforementioned.

Plaintiff was instructed by the engineer herein mentioned to oil said machinery, and prior to the happening of this accident plaintiff had, according to instructions, done said oiling about four or five times, and plaintiff was not an experienced mechanic or engineer, but had been employed as a laborer and was accustomed to doing ordinary laborer's work and was unaccustomed to machinery.

Plaintiff, at the time of said injury, was merely a substitute for a man who was relieved for a cause unknown to this plaintiff, and by reason thereof was unfamiliar with the machinery aforementioned.

VI.

That the aforesaid injuries to the plaintiff were not due to any carelessness, fault or negligence of his own, but were due to and occasioned by the indifference, carelessness and gross negligence of the defendant corporation. That the carelessness and negligence aforesaid consisted in failing to provide

a safe place for plaintiff to work in and to provide and maintain reasonable safeguards for the aforesaid cogs, shafts and gearings.

VIII.

At the time of the injury aforementioned plaintiff was capable of earning and was earning Three Dollars ($3.00) per day, and by reason of this accident he had lost in wages approximately Two Hundred Sixty-two Dollars ($262.00) up to the time of filing his original complaint.

IX.

That by reason of his aforesaid injuries plaintiff has suffered damages in the sum of Twelve Thousand Dollars ($12,000).

The answer of the defendant denies generally the allegations of the second amended complaint, and by way of affirmative defense the defendant set up assumption of risk and contributory negligence on the part of plaintiff. The affirmative defenses pleaded by the defendant are as follows:

"That on, to-wit, July 12th, 1910, this defendant was engaged in the construction of a concrete building situated on the northeasterly side of Snoqualmie River and immediately below Snoqualmie Falls; that situated in a northeasterly direction from said building and about nine hundred feet distant therefrom was a gravel pit, and located about twenty-five feet above the gravel pit was a tramway to which the said gravel was elevated and down the slope of which it was carried by water, which washed the dirt out of the gravel, and said gravel was deposited in bunkers from which it was removed to a concrete mixer at the place said con-

crete power house was being constructed; that at the top of said tramway and immediately above said gravel pit was situated a lift or elevator, and that the gravel was elevated from a point about twenty-five feet below said lift and by bucket running on an endless chain; that this endless chain was operated by said elevator, in the construction of which a set of cogs were used; that this elevator was operated by electric power, and that for a period of about three weeks prior to the happening of the accident to the plaintiff, he was the motorman employed for the purpose of and engaged in the operating of said elevator, and it was his duty as motorman, not only to operate said elevator, but to keep the shafting, bearings and parts thereof oiled and in running order; that the cog wheels used in said elevator were in plain and open view and that the danger of injury to the plaintiff should he allow the sleeve of his jumper to be caught therein was open, apparent and manifest and well known to the plaintiff; that the plaintiff had entire control of said elevator and that it was not necessary for him to have oiled the shafting about where the cogs were located while said elevator was in operation; that if any danger there was in the oiling of the shafting about the cogs, the plaintiff could have stopped said elevator and oiled any of the bearings without any danger to him whatsoever. That said elevator was an isolated piece of machinery, not connected in any manner with any operating factory or manufacturing plant, but was used as aforesaid solely and exclusively for the purpose of elevating the gravel for the purpose of washing the same and allowing the same to descend along the decline of said tramway for use in the making of concrete for the construction of said power house building. That the manner and

method of operating said elevator and the condition thereof and the risk and danger, if any such risk and danger there were incident to the operation of the same, were naturally incident thereto, and were all open, apparent and fully understood and appreciated by the plaintiff, and were assumed by him as a part of his employment.

For a further, separate and second affirmative defense to the matters and things alleged in the amended complaint, the defendant repeats the allegations contained in the first affirmative defense, and further alleges that if any injury or damage was sustained by the plaintiff at the time of his alleged injury set forth in his complaint and in his amended complaint, the same was caused and contributed to solely by the careless and negligent acts and conduct of the plaintiff himself, and was not caused or contributed to by any careless or negligent acts or conduct on the part of this answering defendant, its agents or employes whatsoever."

Transcript, pages 33, 34 and 35.

The reply of the plaintiff denies the affirmative allegations in defendant's answer. (Transcript, page 38.)

After the verdict was returned and within the time allowed by law the defendant filed a motion for a new trial. (Transcript, page 150.) Judgment was thereafter entered on the 15th day of February, 1912, in favor of the plaintiff and against the defendant, for Four Thousand Two Hundred and Sixty-two Dollars ($4,262.00) and costs. (Transcript, page 155.) Defendant's motion for a new trial was denied by the Court. (Transcript, page 155.)

Thereafter a petition for writ of error was duly filed by defendant (Transcript, page 218) and an order entered allowing the writ of error and fixing supersedeas bond, and citation was duly entered and writ of error issued. (Transcript, pages 228 and 229.)

The defendant duly filed and served its assignment of errors, and the errors assigned and upon which the defendant relies are found at pages 221 to 224, inclusive, of the transcript, and are as follows:

ASSIGNMENT OF ERRORS.

I.

That the Court erred in refusing to sustain defendant's objection to certain testimony of the plaintiff. The following question was propounded to William Savage, a witness for the plaintiff:

Q. Do you know whether the cogwheels and machinery around the motor were guarded or not, Mr. Savage?

To this question the defendant objected on the ground that it was immaterial. The court overruled defendant's objection, to which ruling defendant excepted and exception was allowed.

II.

The Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

Q. I show you a picure of a machine, and I will ask you to state to the jury whether it is customary for companies for whom you have been employed in the past operating machines that you have seen, to guard cogwheels of that sort?

Mr. McCORD: I object to that as irrelevant, immaterial, incompetent and particularly, your Honor, in view of the law as it exists now. Under the statutes of this State and since the Factory Act is passed, machinery in factories and machinery plants are required to be guarded. This case does not come within that act and counsel is not proceeding upon that theory, and what would be customary in a factory or sawmill or a flour mill has no application to an isolated machine out in the open, which is intended only for temporary purposes. I do not think the question is proper.

THE COURT: If the Factory Act were being invoked here I should consider this question material, but as it is not, I think it is competent for a witness who is acquainted with machinery to testify what is usual and customary in the construction of that kind of machinery.

Mr. McCORD: I object to it on the further ground that it is not a proper hypothetical question, as the witness is not shown to have any knowledge on the subject whatever. He said he had not seen this machine and had not examined it, and did not know anything about it except by passing by.

The objection was overruled and to the ruling of the Court exception was taken and allowed.

Q. Mr. Savage, is it customary for companies to guard cogs of that sort?

A. Well, it has been in all my cases.

Mr McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied.

To this ruling the defendant excepted and exception was allowed.

III.

That the Court erred in overruling the objection of the defendant to certain testimony of the Witness William Savage, a witness on behalf of the plaintiff, as follows:

Q. Mr. Savage, what change might have been made to make it more safe?

A. Well, there is two or three ways they could have changed it, of course.

Q. State to the Court and jury.

A. One, they could have put another platform above that one so that he could have got handily at it, and they could have raised the one that was there a little bit and made it a little longer.

Q. If you are familiar enough with the machine, state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cogwheel any closer than they would be from the machine as you know it, by any change that might be made on that machine?

To which question the defendant objected on the ground that it was irrelevant, incompetent and immaterial. The Court overruled the objection, to which ruling exception was duly taken and allowed.

A. Yes, sir; they could have changed it so as to have got closer to it.

Q. How would that have been done?

A. By putting another platform above the one that was there or raising that one.

IV.

That the Court erred in refusing, at the conclusion of the testimony, defendant's motion for a directed verdict in favor of the defendant. To the ruling of the Court denying defendant's motion for a directed verdict the defendant duly excepted, and exception was allowed.

The following proceedings were taken upon said motion:

Mr. McCORD: I now move the Court to take the case from the jury and to direct the jury to bring in a verdict in favor of the defendant in this action, for the reason that upon the entire testimony the plaintiff has entirely failed to make out a case of negligence against the defendant. I do not care to argue the matter at any length. I simply want to call attention to my view of the matter, that the plaintiff, while he was injured, was working in a place where the danger of the machine was open, obvious and apparent to him. He has shown himself to be a man of ordinary understanding and unimpaired eyesight, and he could see this machine, and he could see its danger and appreciate it, and knew that if he put his hand in contact with it or allowed his clothes to come in contact with the revolving cogs he would be drawn into it and be injured and hurt.

After argument of the motion to the Court, the Court ruled as follows:

THE COURT: I consider that it is expedient for the jury to decide this case. I shall deny the motion.

To this ruling the defendant excepted and exception was allowed.

V.

That the Court erred in denying defendant's motion for a new trial, to which ruling of the Court the defendant excepted and exception was allowed."

The Bill of Exceptions was duly settled and is found on pages 158 to 213 of the Transcript.

ARGUMENT.

Inasmuch as the fourth and fifth assignment of error strike at the very foundation of the plaintiff's case, we will discuss them before taking up the other assignments, and they can both be considered together, as the argument appertaining to one is equally pertinent to the other.

Fourth Assignment of Error:

That the Court erred in refusing, at the conclusion of the testimony, defendant's motion for a directed verdict in favor of the defendant.

Fifth Assignment of Error:

That the Court erred in denying defendant's motion for a new trial.

An examination of the second amended complaint would indicate that it was the intention of the plaintiff to predicate his action upon the common law and under the Factory Act of the State of Washington. However, at the time of the commencement of the second trial, plaintiff elected to proceed exclusively at common law and waived any claim for negligence under the Factory Act. (Transcript, page 168.) Consequently any liability under the provisions of the Factory Act of the State of Washington is eliminated from the case by the election of counsel to proceed at common law only.

Therefore, we will proceed to discuss the law and the facts of this case with reference to the right of plaintiff at common law and with reference to the liability of the defendant in the same manner.

It is our contention, which is abundantly sustained by the evidence and the law, that the plaintiff assumed the risk resulting in his injury on the 12th of July, 1910, while employed by the defendant, and that under the law he is not entitled to recover in this action, and that it was the duty of the court to direct a verdict in favor of the defendant, and failing to do so, it was his duty to grant defendant's motion for a new trial.

The plaintiff was injured by having his arm caught in the cogs of the revolving cog wheels used in operating the elevator in lifting gravel from a gravel pit to a gravel washing machine. The location of the cog wheels, about four feet above a platform four feet wide and six feet long, in the gravel washing machine, has already been specifically set forth in our statement of the case. We do not deem it necessary to make any more definite and specific statement at this time, but will refer to the testimony in our discussion. The injury occurred while the plaintiff was engaged in oiling

bearings upon the shaft that operated the revolving cog wheels. The accident occurred about two o'clock in the afternoon of July 12, 1910, on a clear day, and the light was excellent and the eyesight of plaintiff unimpaired, and he could readily see and observe the revolving cog wheels and all of the machinery connected therewith. It was perfectly light at all times and he testified that he could see perfectly at the time of his injury.

The plaintiff was a man of about twenty-seven or twenty-eight years of age, and according to the allegations of the complaint had been running a motor and cars for some time prior to the date of the injury, and that he had oiled the machinery in question four or five times prior to the date of his injury, and on several different days. He had operated, according to his testimony, an electric motor on the ground near the gravel washing machine for some weeks prior to the accident. He also testified as follows:

Q. How many times were you up there, Melovich?

A. Three or four times before his arm was taken off.

Q. How many days had you been oiling it?

A. When Slim was there; he was there six days he said.

Q. You were up there every day for three or four days, were you?

A. No, he hadn't been up there all the time—just when they sent him up.

Q. On how many different days were you up there?

A. Well every other day he would send me up; that is, he didn't go over there only just when he was sent up there. (Transcript, page 194.)

David Roberts, a witness on behalf of the defendant, testified that shortly after the accident the plaintiff had told him that he had oiled machinery for a period of twenty days about ten times a day. (Transcript, page 211.)

Plaintiff also testified that he took care of and oiled the motor that he had been operating for several weeks prior to the accident, but that that motor was covered.

Again, the plaintiff described in his testimony the location of the platform above which the cog wheels rested, the location of the shafting and the wheels themselves, the belting and the chains operating the elevator, and was able to identify and describe all parts of the gravel cleaning structure by reference to the photographs introduced in evi-

dence by the plaintiff and identified as Exhibit "A." (Transcript, pages 169-170.) He also described the manner in which he oiled the bearings and the shafting and explained that he stood directly in front of the cog wheels as they revolved toward him, and described the oil can, which he said was a foot and a half long, including the spout (Transcript, page 171); that he oiled the machinery while it was still running, and described the size of the platform and space adjoining the machinery within which he could move around in order to oil the same. (Transcript, page 170.) He further testified as follows:

Q. Tell the jury how much space there was between the different pieces of machinery on that platform—how much space there was for you to move about in?

A. There was no room to turn around in; he has to stand in one spot to oil, the platform was so small.

A. About one foot from the belt to the track wheel.

Q. How's that?

A. About one foot, I should judge, from the belt to the track wheel.

Q. Ask him about the top of the platform, I mean, and not the ground?

A. At the top of the platform.

Q. Where the different pieces of machinery were?

A. Yes, where the gravel machine was, between the wheels, about one foot, and about another foot between that wheel and the other wheel, and the other wheel there was a box to be oiled about half a foot from the wheel and he had to reach over there, and that is why his arm was taken off. (Transcript, pages 175-6.)

Again upon his cross-examination he described the machinery and all of the surroundings, giving the width of the platform and the length of it, and the place where the machinery was located above the platform, and the distance from the cog wheels to the platform upon which he was standing, the size and dimensions of the two cogwheels, and he further testified:

Q. Now, you came up here (referring to the platform) on the day you were hurt and oiled the right bearing first, did you?

A. One here and one here (indicating), he said, the shaft, and that is the first point he threw oil on (showing), and he came over here and he put some oil there (showing), and he reached over here to oil this one when it caught his arm and took his arm off.

Q. You had oiled the one on the right hand side, both bearings on both shafts?

A. Yes, sir.

Q. And then did you reach across from here to oil this bearing over there (showing)?

A. There was no way to get past over there and he had to reach into here.

Q. As I understand you, you oiled this bearing and then this one over on that side, and then you came over on that side of the cog wheels, did you?

A. Yes.

Q. Now, where were you standing?

A. Yes, he oiled that one and then he *held back his clothes,* reached over and oiled this one. (Transcript, pages 182-183.)

Q. Do you mean to tell me that you didn't know there was any danger—if you deliberately put your hand in that revolving wheel you thought it would not hurt you, did you?

A. He doesn't know—no, he would not have done anything like that—he would not have.

Q. I want to know whether you didn't know it was dangerous for you to deliberately put your hand in that wheel?

A. No, he doesn't know anything about it?

Q. Didn't you testify in the trial of this case the last time that you knew it was dangerous?

A. He don't remember—he don't know that he said it.

Q. Didn't you state in your former examination, the former hearing of this case, that you would not have put your hand in that wheel for anything, and you would not be fool enough to put the oil can in that revolving cog wheel?

A. Yes, he said he asked him and asked him and asked him, and he said, "I am not crazy enough to stick my hand in there."

Q. You said you were not crazy enough to stick your hand in there—that was what you testified on the former trial?

A. He said that he remembered this way, that he told me to tell the lawyer that anybody that had any sense wouldn't put his hand in there.

Q. That is it exactly, and because you had some sense you would not put your hand in it, either, would you?

A. I would not have gone up and he would not have put his hand in there if he knew it would have took his arm off.

Q. Mr. Melovich, didn't you, on the former trial of this case, in answer to the following question, make the following answer?

"What did you mean a little while ago when you said to the jury that you knew better than to put your hands in there when you were putting the oil on the cog wheels," and didn't you answer that question as follows:

"Any crazy man would know better."

A. He says he didn't have to tell him he was crazy; he says that he had to go up there and oil this machine or oil this box—he knew that he had to do it—he was told to do it.

Q. You heard my question and I want to know, not what he is saying now, but whether or not he testified that way at the last trial. I want you to put it to him so that he will understand it,—whether or not he so testified on the former trial of this case—whether he did or did not. You understand my question, do you?

THE INTERPRETER: Yes.

A. He says that the lawyer asked him a hundred different times, or several different times, why didn't he put his hand in there, and he said he told him he was not a crazy man.

Q. Ask him to answer me yes or no—did he testify that any crazy man would know better than to put his hand in that cog wheel?

A. Well, he is answering it the same way I gave it to you before. I can't get him to say yes or no. I asked him to answer it yes or no. (Transcript, pages 189, 190-1-2.)

The witness, after being instructed by the court to answer the question, declined to do so. Transcript, page 193.)

The testimony of the witness, if the Court will examine it, will disclose that he was a man of ordinary intelligence and that he was feigning ignorance as much as possible to aid him in procuring a verdict at the hands of the jury, but the testimony shows that the plaintiff was shrewd and keen enough to realize the danger that would result to him if he would frankly admit upon the second trial the facts that he testified to upon the first trial, viz: That he knew the revolving cog wheels were dangerous and that if he came in contact with the cog wheels he would be injured. But the Court can reach no other conclusion than that the witness fully understood the danger and realized that if

he permitted his clothes, or his hands, or arms to be caught in the cog wheels he would suffer an injury. This is inadvertently disclosed by him in his testimony where he stated that in reaching over one of the cog wheels to oil the bearings he pulled back his clothes. Why would he do this, if he did not have sufficient intelligence, as his counsel contends, to realize and appreciate the danger that would result to him if his clothing came in contact with the revolving cog wheel? There is no other conclusion to be reached but that the witness's own testimony demonstrated his knowledge of the danger and his appreciation of the injury that might result to him if he became enmeshed in the cog wheels.

Mr. Sears, a witness on behalf of the defendant, testified that he remembered noticing the plaintiff before the accident and of having the superintendent speak of him as an unusually bright man, and that he was advancing both him and his brother and a couple of his cousins. This testimony, taken in connection with the plaintiff's own testimony, must convince the Court that it is begging the question to say that plaintiff was so ignorant that he could not understand and appreciate the danger incident

to oiling the machinery with the revolving cog wheels in motion. Moreover, it does not require a high order of intelligence to operate and understand the dangers incident to machinery in motion.

We have quoted at some length the portions of the testimony of plaintiff to show that he was a man of ordinary intelligence and experience, and to some extent at least familiar with machinery, and that he had been operating an electric motor, acting as brakeman upon railroad trains, and that he had upon a number of occasions oiled the particular machinery in question. There are some acts that all persons of ordinary intelligence are presumed to know and cannot be heard to say that they did not know and apprehend.

In the case of *Maki vs. Union Pacific Coal Company*, 187 Fed. 389, the facts involved were almost identical with those in this case. We quote from the opinion of Judge Sanborn in that case as follows:

"On November 18, 1902, a servant of the defendant, the Union Pacific Coal Company, a corporation, was drawn in between two unfenced cog wheels used by it about its mine at Hanna, in the State of Wyoming, and killed, and Jacob Maki, the administrator of his estate, brought this action to

recover damages caused by his death. At the opening of the trial the plaintiff's counsel made a statement of his case, the material facts of which are these:

In the shaker which was operated in connection with the mine to shake and screen the coal there were two unfenced coacting cog wheels, 'one of which ran horizontally, and right below that was another which ran perpendicularly.' By the side of these wheels and about two and a half feet below the place where they engaged were two planks. The horizontal wheel extended over one plank, so that the decedent had only one plank on which to pass it. He was a Finlander, was employed in and about the machinery, and it was his duty, among other things, to oil the machinery and to pass these cog wheels on this plank about once an hour. On November 18, 1902, the machinery stopped and he was found dead between the wheels. These wheels were not guarded, and had been without fence or guard for a long time."

The Court directed a verdict in favor of the defendant.

In that case it was further contended that the failure to fence off said machinery was negligence in itself, just as it is contended in this case a failure to box in the cog wheels was negligence in itself, and that the servant would not assume the risk of his master's negligence, and therefore the plaintiff was entitled to a verdict, but the Court said:

"The answer is that, while it is true that the servant does not assume the risk of his master's negligence, the effect of which is neither known to him, nor readily observable, nor to be apprehended, yet he does by continuing in the employment without complaint, assume the risk of the effect of such negligence which is known to him or is obvious or plainly observable, and the danger of which is appreciated by him, or is clearly apparent, just as completely as he assumes the ordinary risks of his occupation."

And in support of such statement the court cited the following cases:

Texas & Pac. Ry. Co. vs. Archibald, 170 U. S. 665, 672, 18 Sup. Ct. Rep. 777; 42 L. Ed. 1188;

Choctaw, Oklahoma & Gulf R. R. Co. vs. McDade, 191 U. S. 64, 68, 24 Sup. Ct. Rep. 24, 48 L. Ed. 96;

St. Louis Cordage Co. vs. Miller, 61 C. C. A. 477, 490, 126 Fed. 495, 508, 63 L. R. A. 551;

Burke vs. Union Coal & Coke Co., 84 C. C. A. 626, 628, 157 Fed. 178, 180;

Lake vs. Shenango Furnace Co., 88 C. C. A. 69, 74, 160 Fed. 887, 892;

Kirkpatrick vs. St. Louis & S. F. R. Co., 87 C. C. A. 35, 38, 159 Fed. 855, 858.

"The absence of any fence about the revolving cog wheels and the risk and danger of injury by them were so plainly observable by the decedent, who had been oiling them and passing them on the

plank by their side about once an hour, that he could not have failed to have seen and known them."

And in the Maki case the contention was also made, as it is here, that a recovery may some times be had where the risk is obvious, but the danger is not fully appreciated by the party injured, but the Court in answer to such contention said:

"But the decedent was a man presumably possessing the ordinary faculties of an adult who has a sound mind and body. It is true that he was a Finlander; but the statement of his counsel contained no intimation that he could not see these engaging wheels or could not understand or know that they would crush a human being drawn between them; that a person upon the revolving horizontal weight might be caught between them, and that the clothes of one caught between the engaging cogs would draw him between the wheels; and in the absence of any claim or declaration that he had not the ordinary intelligence, ability and prudence of men in like situations, he must be presumed to have been a Finlander of ordinary prudence and intelligence. And one cannot be heard to say that he did not know or appreciate a danger, whose knowledge and appreciation were so unavoidable that a person of his prudence and intelligence could not have failed to perceive and appreciate it."

And in support of the foregoing statements, the Court cited the following cases:

"*Lake vs. Shenango Furnace Co.*, 88 C. C. A. 69, 74, 160 Fed. 887, 892;

St. Louis Cordage Co. vs. Miller, 61 C. C. A. 477, 495, 126 Fed. 495, 513;

Kirkpatrick vs. St. Louis & S. F. R. Co., 87 C. C. A. 35, 39, 159 Fed. 855, 859;

King vs. Morgan, 109 Fed. 446, 448, 48 C. C. A. 507, 509;

Moon-Anchor Consol. Mines vs. Hopkins, 111 Fed. 298, 305, 49 C. C. A. 347, 353.

In the case of *Butler vs. Frazee,* 211 U. S. 459, 29 Sup. Ct. Rep. 136, the operator of a mangle in a laundry had her fingers drawn within the revolving cylinder, and it appeared that a finger guard in front of the cylinder was out of adjustment and that the fingers of the operator were caught and crushed in the cylinder, and in discussing the subject the Court say:

"One who understands and appreciates the permanent conditions of machinery, premises and the like, and the danger which arises therefrom, or, by the reasonable use of his senses, having in view his age, intelligence and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an extensive discussion of it or an attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption

of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it, which from time to time have been made, as, for instance, by Congress in the safety appliance law. But the common law in this regard has not been modified in the District of Columbia and we have no other duty than to enforce it. * * *

But where the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both conditions and the dangers are obvious to common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the Court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained and it is the duty of the judge presiding at the trial to instruct the jury accordingly. Citing *Patton vs. Texas & P. R. Co.*, 179 U. S. 658, 45 L. Ed. 361, 21 Sup. Ct. Rep. 275.

"The danger of being drawn between the cylinder and the rollers by contact with the cylinder was illustrated to her every minute of the day by the drawing of the clothes to be ironed by contact with the revolving cylinder. The distance between the

guard rail and the feed board was constant and its relation to the thickness of her hand was apparent. She must have understood that if her hand became inextricably entangled with the clothes, as seems from the rather vague testimony of the plaintiff was the case here, it would be drawn between the cylinder and receive the injury which unhappily occurred. We think that it must be said as a matter of law, that she voluntarily assumed the risk of the danger."

Butler vs. Frazee, 211 U. S. 459, 29 Sup. Ct. Rep. 136.

In view of the law as laid down by the Supreme Court of the United States in the foregoing case, we do not see how it is possible for this Court to reach any other conclusion than that the plaintiff in this case must have known that his arm would be injured if he allowed it to come in contact with the revolving cog wheels, and particularly in view of the fact that he says that he pulled his clothing back so as not to be caught in the machinery; and he later in his testimony, (page 188 of the Transcript), says he did not have to keep his clothing off the cog wheels, as his "jumper was tight fitting."

The plaintiff cannot be heard to say, in view of his admissions as to knowledge and appreciation of danger, that he did not know the danger. His entire testimony must be taken together and a common sense interpretation given to it.

When a servant was between 19 and 20 years old and sound in body and mind at the time he was injured, and possessed of the knowledge and experience of an adult, he was chargeable with the consequences of such knowledge, and the fact that he was under twenty-one years of age was not material in determining whether he assumed the risk of the dangers he involuntarily encountered in the operation of defendant's machinery.

Federal Lead Co., vs. Swyers, 161 Fed. 687.

In the case of *Puget Sound Electric Ry. vs. Van Pelt,* 168 Fed. 206, this court approved the following instruction:

"He is chargeable with the assumption of the risks that were necessarily incident to the employment, and with the assumption of risk which he knew about, of which he had knowledge—actual knowledge—and also with the assumption of risks which were obvious and which should have been known to him, if he had been vigilant and alert for his own sake. If the fuse was placed in a situation where it would injure him by its explosion, and there was negligence on the part of defendant in placing it there, the question then to be decided is whether the plaintiff himself knew that it was liable to explode and flash in his eye and do him injury. If he had that knowledge, it should be considered that he assumed all risk, and he is not entitled to compensation by reason of the injury which he suffered."

In this case the danger was different from that in the case of the fuse. Here it must be conceded that the danger from the revolving cog wheels was obvious and open, and not latent, and one which any man even of the lowest order of intelligence would appreciate, particularly in view of the statement that he held back his clothes so as not to come in contact with the cogs, and that a crazy man would not put his hand in contact with the revolving wheels, so that this rule of law for which we are contending is not only unheld by the decisions of the Circuit Court of Appeals of other circuits, but by the Supreme Court of the United States and by this State.

"There are some things must be charged to the common knowledge of all men. That a pile of wood four feet wide and eighteen feet high is obviously dangerous and that it might fall at any time is apparent to any one in possession of his faculties."

Deaton vs. Abrams, 60 Wash. 4.

In *Goddard vs. Interstate Telephone Co.,* 56 Wash. 536, everything "was out in the open," there was no hidden defect and no knowledge was withheld.

In *Soderburg vs. Wells,* 57 Wash. 281, it was said: The following rule of the courts of other states were adopted by this Court:

"In discussing the safe place doctrine, in *Borden vs. Daisy Roller Mill Company,* 98 Wis. 407, the Court said:

'In the discussion and decision of this case the rule has been kept clearly in mind that a servant is not obliged to search for defects in instrumentalities furnished for his use, but may rely on the duty of the master to see that they are reasonably safe; yet such rule does not militate at all against that other rule, just as well settled in the law of negligence, that the master may rely on the duty of the servant to observe all defects and dangers which reasonable attention to the work in hand will generally disclose to a person of ordinary intelligence and experience in such work.'

In *Illinois Central R. R. Co. vs. Sanders,* 58 Ill. App. 177, the Court said:

'A man cannot decline to see and then hold the master liable, excusing his own negligence by saying that he was under no primary obligation to investigate.'

In *Evansville & T. H. R. Co. vs. Duel,* 134 Ind. 156, the Court said:

'While the employees may repose confidence in the prudent and cautious adherence to duty by the employer, yet he may not repose that blind confidence in the performance of the employer's duty

which fails to observe the patent defects which an ordinary observation of the employee's duty would readily disclose.'

In *Chesson vs. Roper Lumber Company,* 118 N. C. 59, the Court said:

'The servant is culpable if he fail to discover such a defect as would have been apparent, without a thorough examination, if he had used ordinary diligence to discover it.' "

"The consensus of these decisions is, that where the danger is alike open and obvious to the servant as well as the master, both are upon an equality, and the master is not liable for an injury resulting from a danger incident to the employment."

Deaton vs. Abrams, 60 Wash. 6.

In the case of *Shore vs. Spokane & Inland Empire Railroad Company,* 57 Wash. 212, the Court said:

"He knew that if he came in contact with the two wires while the wire he was strinigng was grounded the result would be disastrous if not fatal to him. His injuries resulted from dangers incident to his employment, which he clearly assumed. It would be idle to cite decisions from this and other courts to that effect, but the rule is clearly stated in the following cases:

Week vs. Fremont Mill Co., 3 Wsah. 629, 29 Pac. 215;

Schulz vs. Johnson, 7 Wash. 403, 35 Pac. 130;

Olson vs. McMurray Cedar Lumber Co., 9 Wash. 500, 37 Pac. 679;

Bullivant vs. Spokane, 14 Wash. 577, 45 Pac. 42;

Hoffman vs. American Foundry Co., 18 Wash. 287, 51 Pac. 385;

Anderson vs. Inland Tel., etc., Co., 19 Wash. 575, 53 Pac. 657;

Brown vs. Tabor Mill Co., 22 Wash. 317, 60 Pac. 1126;

Danuser vs. Seller & Co., 24 Wash. 565, 64 Pac. 783;

Grout vs. Tacoma Eastern R. Co., 33 Wash. 524, 74 Pac. 665;

Bier vs. Hosford, 35 Wash. 544, 77 Pac. 867;

Ford vs. Heffernan Engine Works, 48 Wash. 315, 93 Pac. 417;

Brown vs. Oregon Lumber Co., 24 Ore. 315, 33 Pac. 557.

"Respondent had been employed around the mill as a common hand for about three months, but the accident which caused the injury happened on the third day of his employment within the mill. The cog which crushed the finger of respondent was uncovered. His theory is that this was negligence on the part of appellant, and that in any event respondent should have been instructed as to his duties around the machinery and the danger of the same. Respondent in picking up small pieces of lumber which had fallen over the skid and in front of the cog which was in the live roller, did not notice the cog, and his hand was

thereby brought in contact with it and the injury induced. He claims he did not know that the cog was there, or could not see it by reason of its being covered by this refuse lumber."

The dangers in this instance were apparent and the law is well settled that the employee, when he assumd the employment, took the risk of all apparent danger.

"Three days' observation of this machinery around which this man was working would naturally make him acquainted with the location of all of the cogs; and if he did not exercise discretion or thought or care enough and pay sufficient attention to their location to know where they were, he cannot complain if by reason of such heedlessness he is damaged."

Olson vs. McMurray Cedar Lumber Co., 9 Wash. 500.

We do not feel that it is necessary to multiply citations announcing the doctrine set forth in the preceding cases which we have cited. The rule is well settled that where the dangers are open, obvious and apparent, as in the case of exposed cog wheels, such dangers are incident to the business and to the employment, and are assumed by the servant, and that the master is not liable for injuries sustained through such assumed risk. And

it was the duty of the lower court to have ordered a directed verdict in favor of defendant. Inasmuch, however, as he did not do so, then it was clearly his duty to grant defendant's motion for a new trial. Consequently this Court should direct that the directed verdict should be entered and the action dismissed; or in any event, the action should be reversed and a new trial granted.

We will now take up and discuss the other errors assigned.

Second Assignment of Error:

The Court erred in overruling the objection of the defendant to certain testimony of the witness William Savage, a witness on behalf of the plaintiff, as follows:

"Q. I show you a picture of a machine and I will ask you to state to the jury whether it is customary for companies for whom you have been employed in the past operating machines that you have seen, to guard cog wheels of that sort?

Mr. McCORD: I object to that as irrelevant, immaterial, incompetent, and particularly, your Honor, in view of the law as it exists now. Under the statutes of this State and since the Factory Act is passed, machinery in factories and machinery plants are required to be guarded. This case does not come within that act and counsel is not proceeding upon that theory, and what would be

customary in a factory or sawmill or a flour mill has no application to an isolated machine out in the open, which is intended only for temporary purposes. I do not think the question is proper.

THE COURT: If the Factory Act were being invoked here, I should consider this question material, but as it is not, I think it is competent for a witness who is acquainted with machinery to testify what is usual and customary in the construction of that kind of machinery.

Mr. McCORD: I object to it on the further ground that it is not a proper hypothetical question, as the witness is not shown to have any knowledge on the subject whatever. He said he had not seen this machine and had not examined it, and did not know anything about it except by passing it.

The objection was overruled, and to the ruling of the Court exception was taken and allowed.

Q. Mr. Savage, is it customary for companies to guard cogs of that sort?

A. Well, it has been in all my cases.

Mr. McCORD: I move to strike that out as not responsive to the question.

THE COURT: The motion is denied.

To this ruling the defendant excepted and exception was allowed."

The Court erred in permitting Mr. Savage to testify as he did. In the first place, he was not shown to have any qualifications or any knowledge

or experience in the business sufficient to enable him to form an opinion; and, in the second place, the answer was not responsive to the question. The answer might have been true, but yet would have no tendency to establish any particular custom in regard to guarding cog wheels; and, in the third place, the question and answer were wholly immaterial, if this action had been prosecuted under the Factory Act of the State of Washington, but in view of the waiver of the right to proceed under that act by counsel for the plaintiff at the commencement of the trial, it became wholly immaterial as to what the custom was. The witness further testified that he had no knowledge of the conditions around this machine and knew nothing about the operation of a gravel machine, such as this one was; and yet the admission of this testimony by a party not qualified was certainly prejudicial to the defendant, and the Court erred in permitting the witness to testify and in refusing to strike the testimony from the record.

Third Assignment of Error:

That the Court erred in overruling the objection of the defendant to certain testimony of the wit-

ness William Savage, a witness on behalf of the plaintiff, as follows:

"Q. Mr. Savage, what change might have been made to make it more safe?

A. Well, there is two or three ways they could have changed it, of course.

A. State to the Court and jury.

A. One, they could have put another platform above that one so as he could have got handily at it, and they could have raised the one that was there a little bit and made it a little longer.

Q. If you are familiar enough with the machine state to the jury whether it would have been possible for a person to have approached the bucket wheels and the box around the cog wheels any closer than they would be from the machine as you know it, by any change that might be made in that machine?

To which question the defendant objected on the ground that it was irrelevant, incompetent and immaterial. The Court overruled the objection, to which ruling exception was duly taken and allowed.

A. Yes, sir; they could have changed it so as to have got closer to it.

Q. How would that have been done?

A. By putting another platform above the one that was there, or raising that one."

The witness Savage testified over the objection of defendant that changes could have been made that would have rendered the operation of the cog

wheels safer than the means employed by the de-defendant. There is probably no accident that ever occurs that might not have been prevented by the adoption of some other means or appliances. After an accident, it is always easy for a suggestion to be made of some improvement that would have prevented the accident. But we contend that this is not the test of liability for injury, and that any evidence tending to show changes or repairs to prevent recurrence of the injury is inadmissible, and the Supreme Court of Washington has repeatedly so held. In an action to recover for injury received on account of negligence of the master to provide improved machinery and appliances, evidence is incompetent for the purpose of showing that changes have been made in such machinery after injury to an employee.

Bell vs. Washington Cedar Lumber Co., 8 Wash. 27.

"Evidence that after an accident defendant remedied the defect is not admissible for the purpose of showing negligence."

Carter vs. Seattle, 21 Wash. 585.

This Court has held and the Supreme Court of

Washington has held that since the passage of the Factory Act, evidence that repairs have been made after the injury is inadmissible to show that the machinery could have been practically guarded, but for no other purpose.

On an issue as to whether a saw could have been advantageously guarded under the Factory Act, it is not error to admit evidence that after the accident it was guarded, where the evidence was offered for the purpose of showing that the same could have been guarded, and the jury were instructed to consider it only for that purpose.

Erickson vs. McNeeley, 41 Wash. 509;

Thompson vs. Issaquah Shingle Co., 43 Wash. 253.

For the foregoing reasons we are confident that the lower court committed errors to the material detriment of the defendant, and that this action should be reversed and ordered dismissed, or in the alternative a new trial should be granted.

Respectfully submitted,

KERR & McCORD,
Attorneys for Plaintiff in Error.